

### **ADVISORY OPINION 2001-005**

**Any advisory opinion rendered by the registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the advisory opinion is rendered. KRS 121.135(4).**

August 27, 2001

Hon. Franklin K. Jelsma  
Wyatt, Tarrant & Combs, LLP  
500 W Jefferson St., Suite 2800  
Louisville, Kentucky 40202-2898

Dear Mr. Jelsma:

This is in response to your July 26, 2001 letter on behalf of Mr. Brereton C. Jones requesting an advisory opinion regarding what laws and regulations, if any, would govern Mr. Jones' pre-exploratory activities, while he is contemplating becoming a candidate for Governor. You state that, as part of the evaluation of his potential candidacy, Mr. Jones intends to travel in Kentucky to meet with friends, public officials, business leaders, interest groups and concerned citizens in order to better inform himself about the issues and the people who have an interest in public and political issues confronting the state. Any expenditures incidental to this travel, Mr. Jones intends to pay personally. Specifically, you submit five (5) questions concerning Mr. Jones' activities, the Registry's response to which follows:

**(1) What laws and regulations, if any, govern Mr. Jones' pre-exploratory committee political activities, in terms of travel, evaluation of his potential candidacy, and volunteer activities of friends and supporters?**

KRS 121.015(8) defines “candidate” as “any person who has received contributions or made expenditures, has appointed a campaign treasurer, or has given his consent for any other person to receive contributions or make expenditures with a view to bringing about his nomination or election to public office.” (Emphasis added.) In addition, regarding a candidate for Governor, the legislature has required the creation of a slate of candidates, which is somewhat more narrowly defined:

“Slate of candidates” means any two (2) persons who have filed a joint notification and declaration pursuant to KRS 118.127, received contributions or made expenditures, appointed a campaign treasurer, designated a campaign depository, or given their consent for any other person to receive contributions or make expenditures with a view to bringing about their nomination for election to the offices of Governor and Lieutenant Governor. KRS 121.015(9), KRS 121A.010(6). (Emphasis added.) See also, Gable v. Jones, 142 F. 3d 940, 945-947 (6<sup>th</sup> Cir. 1998), cert. denied, 525 U.S. 1177 (1999) (upholding slating provision).

Further, under KRS 121A.010(6) “unless the context requires otherwise, any provision of law that applies to a candidate shall also apply to a slate of candidates.”

As you state in your letter, prior to forming a slate of candidates, persons may register an exploratory committee “for the purposes of determining the feasibility of forming a slate of candidates ... or for determining the composition of a slate of candidates ... prior to filing a joint notification and declaration as a slate of candidates,” which may be established no earlier than one year before the year in which a slate of candidates for Governor and Lieutenant Governor are elected. KRS 121A.015(1) (Emphasis added).

The foregoing statutory provisions are relevant to the transactions proposed by your letter.

**(2) Under any of the circumstances described above (e.g., (a) unpaid volunteers, acting on their own initiative, assisting in travel, research and meetings or (b) personal payment of Mr. Jones’ travel expenses by Mr. Jones), would the Registry classify monetary expenses and unpaid volunteer time related to Mr. Jones’ pre-exploratory committee travel and gauging of political support as “contributions” or “expenditures” or “in-kind contributions” under KRS Chapter 121 or 121A? What, if any, remedial actions would apply if the Registry found such activities to constitute “contributions” or “expenditures”?**

A contribution is defined as a “payment, distribution, loan, deposit, or gift of money or other thing of value to a candidate, his agent, a slate of candidates, its authorized agent, a committee, or contributing organization,” and includes “[g]oods,

advertising, or services,” which are furnished free of charge or at a discounted rate or are paid for by another and utilized by a candidate or slate of candidates. KRS 121A.010(11). Volunteer services provided without compensation are specifically excluded from the definition of contribution. KRS 121A.010(11)(b), 32 KAR 2:170 § 1(5). In the event that activities were determined not to be volunteer, the value of the services could be applied toward the aggregate limits on exploratory activities. (See KRS 121A.015(3).)

Under these statutory provisions, the gift of meals to a candidate would constitute an in-kind contribution. However, the unpaid volunteer services of a person coordinating travel plans for a candidate on their own time would not constitute a contribution. Sums paid for by a candidate to bring about his nomination or election to Kentucky office may be considered a contribution to his campaign. Further, expenditures “for the purposes of determining the feasibility of forming a slate of candidates ... or for determining the composition of a slate of candidates ... prior to filing a joint notification and declaration as a slate of candidates,” KRS 121A.015(1) (emphasis added), may constitute exploratory expenditures and may apply against the aggregate limit established under KRS 121A.015(3).

Moreover, if the amounts in question were classified as “expenditures” under the campaign finance laws and were not for activities which are exploratory in nature, it is possible that they would apply against the spending limit under KRS 121A.030, applicable to slates of candidates qualifying for public financing. In addition to the foregoing, it should be noted that applicable penalties could be levied under KRS 121.990 and 121A.990.

**(3) In Case No. 94-520, the Supplemental Staff Report filed March 14, 1995 recognized that there “has been a question about whether a gubernatorial candidate is a candidate prior to becoming a slate...” This report goes on to conclude that if expenditures made by an individual were coordinated with and not independent of such individual’s staff (in this report the potential candidate was a public official), then the acts of his staff, while under his direct control and supervision, would be attributable to him and therefore would bring him “within the definition of ‘candidate’ in KRS 121.015(8) and all applicable campaign finance laws.” Since the date of that report, the statute has been amended to provide for the creation of an exploratory committee (1996 Ky. Acts, ch. 155, effective July 15, 1996). In order to avoid a chilling effect on protected speech, we believe there must be a bright line in time prior to which a potential candidate can engage in political networking and social/business activities without fear of running afoul of election laws. It appears that the earliest date on which an exploratory committee may be formed (in this case, January 1, 2002) may be that bright line. In view of the specific provisions of the statute that now provide for an exploratory committee (KRS 121A.015), can a potential candidate for governor be classified as a “candidate” under KRS Chapter**

**121 or 121A prior to either (a) forming an exploratory committee, or (b) forming a slate? If so, then at what point does an individual become a “candidate”?**

You ask at what point does an individual become a “candidate,” specifically, a candidate for Governor. Clearly, the application of the above-referenced statutory provisions are contingent on the Registry having jurisdiction to regulate the kind of spending you propose. The Registry’s jurisdiction is in turn contingent on a person being classified as a candidate, slate of candidates or other defined entity subject to KRS Chapters 121 and 121A.

The Registry’s own statutory scheme has set forth the parameters of the Registry’s permissible regulatory activity. For example, in KREF Advisory Opinion 1997-003, the Registry opined that the mere act of asking for financial support, without any incidental expenditure, would not invoke the provisions of campaign finance statutes. Rather, it is the receipt or expenditure of funds, the appointment of a campaign treasurer, or the authorization of another to raise and spend funds, “with a view to bringing about his nomination or election to public office,” that is the bright line test for when one becomes a candidate under KRS 121.015(8). The test is similar for a slate of candidates, as defined under KRS 121.015(9) and KRS 121A.010(6).

Similarly, activities conducted, including polling, traveling, and making telephone calls, “conducted solely for the purpose of determining whether one (1) or more persons should form a slate of candidates for Governor and Lieutenant Governor,” fall within the permissible parameters of an exploratory committee and require registration and reporting under KRS 121A.015.

Conversely, political networking and the conduct of social and business activities by an individual may incur incidental expense to the individual without being conducted with a view to bringing about the individual’s nomination or election to a Kentucky office or determining whether a slate of candidates should be formed. Such incidental expenses would not fall within the Registry’s jurisdiction under KRS Chapters 121 and 121A. “Candidacy” is not merely a classification but instead results from a combination of an individual’s intent coupled with his or her actions by accepting contributions or making expenditures. Similarly, both action and purpose would be relevant in determining the applicability of KRS 121A.015.

**(4) When an individual volunteers to assist Mr. Jones either by arranging meetings with interested individuals or groups, transporting Mr. Jones to events, hosting a party in honor of Mr. Jones, or helping make travel arrangements for Mr. Jones, what actions must Mr. Jones take, if any, in order to verify that the services being provided by such volunteers do not fall within the definition of “contribution”, i.e. that such services are truly voluntary as set forth in 32**

**KAR2:170§1(5)? Is it necessary for Mr. Jones to ask the volunteer if he or she is taking vacation or personal time, works on a commission basis rather than as a salaried employee, is self-employed, etc.?**

As discussed in response to Question 2, volunteer services provided without compensation are specifically excluded from the definition of contribution, as are expenditures by an individual other than a candidate in connection with an event in the individual's home when the individual expends less than \$300. KRS 121A.010(11)(b), 32 KAR 2:170 § 1(5). However, as long as volunteer activities or expenses made by individuals are not being made with a view to bringing about Mr. Jones' nomination or election to public office or determining the feasibility of forming a slate of candidates, they do not fall within the Registry's jurisdiction. Mr. Jones should use whatever precautions deemed prudent to ensure that "volunteers" meet the requirements of 32 KAR 2:170 § 1(5).

**(5) Mr. Jones' primary vocation is raising and breeding thoroughbred horses. As with all businesses, it is to Mr. Jones' benefit to maintain good relations with his clients, potential clients and others in and around his industry. Accordingly, Mr. Jones often holds social and business functions at his home and on his farm (likewise, Mr. Jones is often the guest of others). Such events could include large holiday season open houses, small dinner parties, tours of his farm and hosting guests at local restaurants, charity fundraisers or sporting events. Depending upon the nature of the function, Mr. Jones spends either personal or business funds to cover the costs. At such functions, Mr. Jones' guests often bring up the topic of his potential candidacy for Governor. In fact, it is rare that Mr. Jones can go a day without the topic being raised by someone. At such social/business functions, as a result of spending time with Mr. Jones, people could determine to support Mr. Jones if he formally becomes a candidate. Are there any circumstances in which the amounts Mr. Jones expends hosting business and/or private social events could be classified by the Registry as "campaign expenditures" or could functions at which Mr. Jones is the guest of others (i.e. others have paid for his ticket or dinner, etc.) count as "contributions" by such individuals? Are there any limits on how many people Mr. Jones could host or what can and cannot be said by Mr. Jones at such functions?**

Expenses relating to purely social or business functions and events would not be included in the definition of contribution, as discussed in Question 2. Further, as explained in response to Question 3, Mr. Jones' purely social or business activities are not within the Registry's jurisdiction. See, e.g., KREF Advisory Opinions 1997-003 and case law... (described above), 1997-010 and 1998-004 (opining that business promotions unrelated to candidacy of individual do not fall under jurisdiction of the Registry). (See

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responses to previous questions for the criteria which would apply when expenditures are subject to regulation under campaign finance laws.)

This opinion reflects the Registry's consideration of the specific transactions posed by your letter. If you have any additional questions, please do not hesitate to contact the Registry staff.

Sincerely,

Rosemary F. Center  
General Counsel

RFC/jh

Cc: Registry Members  
Sarah M. Jackson, Executive Director